Supreme Court, U.S.
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No. 98-97

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, California Department of Social Services, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, U.S. REP. JOHN DOOLITTLE, CALIF. SENS. RAY HAYNES, RICHARD MOUNTJOY AND MAURICE JOHANNESSEN, AND CALIFORNIA ASSEMBLYMEN BILL MORROW AND BERNIE RICHTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federally-authorized State statute that establishes a reduced level of public assistance benefits during the recipient's first 12 months of residence in the State is subject to heightened scrutiny under the Equal Protection Clause, where the benefit level is no lower than the benefits the recipient would have received in his/her former State of residence.

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INTERESTS OF THE *AMICI CURIAE*

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in California.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to issues involving the interests of voters and taxpayers and efforts to ensure the prudent expenditure of tax dollars. Toward that end, WLF has participated in numerous cases in this and other federal and state courts in cases involving the administration of social service programs. *See, e.g., C.K. v. New Jersey Dep't of Health and Human Services,* 92 F.3d 171 (3d Cir. 1996). WLF filed a brief in this case when it was before the U.S. Court of Appeals for the Ninth Circuit and in support of the Petition. WLF also participated in a predecessor to this case when the prior case was before this Court; WLF filed briefs both in support of the certiorari petition and on the merits. *Anderson v. Green,* 513 U.S. 557 (1995).

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Rep. John Doolittle is a Member of the U.S. House of Representatives; Senators Ray Haynes, Richard L. Mountjoy, and K. Maurice Johannessen are Members of the California Senate; Assemblymen Bill Morrow and Bernie Rich-

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

ter are Members of the California Assembly. All strongly support California's position in this case.

Amici believe that the ruling below unnecessarily and detrimentally limits California's ability to carry out the budget cuts that have been made necessary by its fiscal difficulties. *Amici* do not believe that it is the proper role for the federal courts to micromanage public assistance programs, particularly where (as here) the challenged program serves rational State policy objectives.

Amici submit this brief in support of Petitioners with the written consent of all parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Facts contained in Petitioners' Brief.

In brief, this suit is a challenge to the constitutionality of California Welfare and Institutions Code § 11450.03, which specifies public assistance benefits to be provided to families that have recently arrived in California.[2] Adopted at a time of fiscal crisis, § 11450.03 is part of the state

[2] Section 11450.03 provides in relevant part:

(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

legislature's larger effort to ensure that the State's diminished public assistance resources are distributed as equitably as possible. Section 11450.03 provides that an eligible family arriving in California from another State shall, during its first 12 months of residence, receive as benefits the lesser of: (1) the benefit level available to similarly situated, long-term California residents; or (2) the benefit level the family would have been eligible to receive in their prior State, had the family not moved to California.

Respondents are two women who moved to California during 1996-97. Both became eligible for public assistance benefits, but were informed by state officials that their benefit levels would (temporarily) be somewhat lower than benefits provided to similarly situated long-term California residents. Respondents assert that § 11450.03 violates the Fourteenth Amendment's Equal Protection Clause by favoring long-term California residents over newcomers.

Section 11450.03 was adopted in 1992, a time of continuing and severe economic and fiscal problems in California. Its stated goal was to reduce the state's staggering welfare expenditures.[3] In October 1992, the Secretary of Health and Human Services (HHS) issued a waiver, signifying its approval of § 11450.03. A federal district court preliminarily enjoined California officials from enforcing

[3] Respondents do not contest that California's annual public assistance benefits are mammoth. For example, in Fiscal Year 1995-96, California provided $6 billion in assistance under the Aid to Families with Dependent Children ("AFDC") program alone. Although it has only 12 percent of the nation's population, California accounts for 29% of all money spent nationwide on the AFDC program; and its monthly average caseload of 2,645,814 persons is 20% of the national AFDC caseload.

the new law (*Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993)), and the Ninth Circuit affirmed. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). This Court granted certiorari and agreed to review the propriety of the injunction. Before the Court ruled, the Ninth Circuit (in connection with unrelated litigation) vacated the waiver that HHS had granted for § 11450.03; in the absence of the waiver, California lacked authority to implement its law. Consequently, the Court held that the case was not ripe for review; it vacated the decisions of the Ninth Circuit and the district court and ordered that the case be dismissed. *Anderson v. Green*, 513 U.S. 557 (1995).

The matter was revived following Congress's adoption of welfare reform legislation in 1996. The reform law (known as the Personal Responsibility and Work Reconciliation Act of 1996, or "PRWORA") explicitly authorized relocation grant provisions of the type contained in § 11450.03.[4] Pursuant to PRWORA, California obtained federal certification for its TANF plan and thereby became

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[4] PRWORA is codified at 42 U.S.C. §§ 601, *et seq*. The relevant provision of PRWORA, 42 U.S.C. § 604(c), provides:

> **Authority to treat interstate immigrants under rules of former State.** A State operating a program funded under this part [42 U.S.C. §§ 601 et seq.] may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

PRWORA gave a new name to the former AFDC program: Temporary Assistance to Needy Families ("TANF"). Pursuant to PRWORA, the federal government provides block-grant funding to states with certified TANF plans.

authorized once again to implement § 11450.03. The district court, however, issued a preliminary injunction on June 4, 1997 against implementation of § 11450.03. Petition Appendix ("Pet. App.") 13-31.

In its opinion, the district court stated that the applicable law had remained unchanged following its 1993 opinion, and it thus re-adopted the earlier opinion. Pet. App. 26-27. The court determined that the distinction drawn by § 11450.03 between new and long-time residents of California was subject to strict scrutiny under the Equal Protection Clause. *Id.* at 27; *Green v. Anderson*, 811 F. Supp. at 521. The court said that § 11450.03 cannot withstand equal protection challenge in the absence of evidence that the law "furthers a compelling state purpose," because § 11450.03 "places a penalty on migration" (*id.*), and because "freedom of travel or migration" is a "constitutional right" that "'occupies a position fundamental to the concept of our Federal union.'" *Id.* at 518 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

The court went on to find that California had failed to meet its heavy evidentiary burden. Pet. App. 21-30. The court rejected California's contention that the proper comparison for equal protection purposes was between Respondents and comparably-situated welfare recipients in the states from which they had come; rather, the district court held, the proper comparison was between Respondents and comparably situated welfare recipients among long-term California residents. *Id.* at 28-30. Section 11450.03 could not withstand strict equal protection scrutiny, the court held, because California had failed to justify its disparate treatment of those two groups. *Id.*

The Ninth Circuit affirmed. Pet. App. 1-12. The appeals court agreed with the district court that, for purposes of equal protection analysis, "the appropriate comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states." *Id.* at 11. The appeals court determined that Respondents had "demonstrated a probability of success on the merits," based upon "the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03" -- which the appeals court determined to be a desire to exclude from California people "with a mindset of economic dependency." *Id.* at 10.

SUMMARY OF ARGUMENT

The California statute at issue in this case, § 11450.03, was enacted in 1992 during a period of fiscal crisis in the State. The statute is an effort to reduce welfare expenditures; in adopting the statute, California determined that the impact of the reductions should fall more heavily on newcomers than on established residents, who may be less able to adjust to benefit reductions. Numerous other States (including, among others, Illinois, Iowa, Minnesota, New York, New Jersey, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming) have made that same determination, with the explicit blessing of Congress (as evidenced by PRWORA).

The decision below treated § 11450.03 as if it were identical to the residency requirements considered in *Shapiro v. Thompson,* 394 U.S. 618 (1969), in which this Court applied heightened equal protection review to -- and ultimately struck down -- State laws that prevented newcomers from receiving welfare benefits for the first 12

months of residence in the State. But unlike the situation in *Shapiro,* in which this Court applied strict scrutiny on the basis that the programs amounted to a "penalty" on the right to interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, even if the Constitution is held to require enhanced scrutiny of residency-based programs that States have established on their own authority, rational basis review should still apply when, as here, the State program has been explicitly authorized by congressional statute.

ARGUMENT

I. SECTION 11450.03 SHOULD BE SUBJECTED TO RATIONAL BASIS REVIEW IN THE ABSENCE OF EVIDENCE THAT IT IMPINGES UPON THE EXERCISE OF THE RIGHT TO INTERSTATE TRAVEL

A legislative classification normally will be found to deny equal protection only if it is not "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Only in

exceptional circumstances is it appropriate for courts to impose a heightened standard of review in cases raising equal protection claims.

The district court found that this was the rare case in which heightened review was appropriate because, it held, § 11450.03 imposes a "penalty" on the right to travel. The court said, "Because § 11450.03 places a penalty on migration, the defendants must show that the statute furthers a compelling state purpose." *Green v. Anderson*, 811 F. Supp. at 521.[5] The Ninth Circuit affirmed, based on the "persuasive authority of our prior affirmance in *Green v. Anderson*," a decision in which the appeals court had adopted the district court's reasoning. Pet. App. 10; *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), *vacated as moot*, 513 U.S. 557 (1995). The decision to subject § 11450.03 to heightened equal protection scrutiny conflicts with numerous decisions of this Court.

A. Section 11450.03 Cannot Be Said to "Penalize" Respondents' Travel When They Are No Worse Off Than If They Had Never Moved

The Court has applied heightened scrutiny in two cases in which state statutes challenged under the Equal Protection Clause were said to impose a penalty on interstate

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[5] The district court's June 4, 1997 opinion (Pet. App. 13-31) did not specify what level of equal protection review it was applying in striking down § 11450.03. However, the opinion stated explicitly that the court was adopting the "right of migration" analysis contained in its 1993 *Green v. Anderson* opinion (Pet. App. 27), and (as noted above) that earlier opinion had subjected § 11450.03 to heightened review. One thus can safely conclude that the district court was employing heightened equal protection review in its June 4, 1997 opinion.

travel. In *Shapiro*, the Court applied strict equal protection scrutiny to State laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first 12 months of residence. The Court held that the right to interstate travel is recognized by the Constitution as a "fundamental" right upon which states may not impose any "unreasonabl[e] burden." *Shapiro*, 394 U.S. at 629-30. The Court said that any classification that serves to "penalize" the exercise of the right to travel violates equal protection "unless shown to be necessary to promote a *compelling* government interest." *Id.* at 634 (emphasis in original). The Court said that the challenged laws imposed just such a penalty: such laws deprive migrating indigents of *any* AFDC benefits for a 12-month period following departure from their former states of residence.

The Court applied strict scrutiny in a second "right to travel" case several years later: *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). *Memorial Hospital* challenged an Arizona law requiring a year's residence as a condition to an indigent's receiving nonemergency medical care at county expense. The Court applied its "compelling state interest" standard after determining that the law "penalized" the right to interstate travel. *Id.* at 257-62. Nonetheless, the Court emphasized that some incidental burdens on interstate travel are not sufficiently onerous to trigger strict scrutiny:

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be *per se* unconstitutional. The Court's holding was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right to interstate travel."

> The amount of impact required to give rise to the compelling-state-interest test was not made clear.

Id. at 256-57 (quoting *Shapiro*, 394 U.S. at 638 n.21). *Memorial Hospital* thus stands for the eminently sensible proposition that laws imposing only minor burdens on the right to interstate travel are not to be subjected to strict scrutiny under the Equal Protection Clause. In the absence of such a rule, commonplace financial exactions (such as tolls collected at interstate bridges or taxes on interstate airline flights) would be rendered suspect.

The courts below found California's residency-based benefit levels constituted a "penalty" on the exercise of the right to travel because they treat newcomers to California differently from other California residents. *Green v. Anderson*, 811 F. Supp. at 521; Pet. App. 28-29; *id.* at 9-10. Hence the courts held that heightened equal protection scrutiny must be applied to California's classification of its residents.

Because § 11450.03 generally provides new residents the same AFDC benefits that they were eligible to receive before moving to California, however, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word. Nor does the statute deny newcomers the exercise of a fundamental right, such as the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). The rational basis standard should therefore govern in this case.

The district court characterized the California program as denying "the necessities of life" in part on the basis that it "makes no accommodation for the different costs of living that exist in different states." *Green v. Anderson*,

811 F. Supp. at 521. But that is a feature of the federal welfare program itself, which permits a State to set its benefit levels at an amount less than the standard of need it has calculated. Under the AFDC program, states were free to "pare down payments to accommodate budget realties by reducing the percentage of benefits paid or switching to a percentage reduction system." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970). PRWORA grants even greater flexibility to states; they are authorized to use federal block grants "in any manner that is reasonably calculated to accomplish the purpose" of the TANF program. 42 U.S.C. § 604(a)(1).

Thus, even a state with no residency-based benefit levels may "penalize" a newcomer or deny "necessities of life" in the sense of failing to set benefits at a level commensurate with the costs of living in his or her new state. But neither the Supreme Court nor this Court has ever indicated that such a failure implicates the right to travel or any other constitutional right.

When a State statute results in newcomers being afforded fewer benefits than established residents, *Shapiro* mandates that the statute be subjected to strict scrutiny *only* when the statute deters or penalizes migration. Where, as here, migration is not being penalized, the Court routinely has subjected such challenged statutes to regular, rational-basis equal protection analysis.

B. *Zobel, Hooper,* and *Soto-Lopez* Were Not "Right-to-Travel" Cases and Did Not Invoke Heightened Scrutiny

In an effort to bolster their contention that § 11450.03 imposes a penalty on interstate travel (and thus is subject

to heightened scrutiny), the courts below cited to three Supreme Court equal protection decisions involving challenges to laws that classified state residents based on length of residence. Pet. App. 11, 27-30. The courts below simply misinterpreted these decisions; none of the three implicated the right to interstate travel, and in none did the Court apply heightened equal protection scrutiny.

Zobel v. Williams, 457 U.S. 55 (1982), involved an Alaska statute that provided annual cash payments to all adult residents based on years of residence; those who had lived in Alaska for one year would receive one dividend unit, those who had lived in Alaska for 21 years would receive 21 dividend units, etc. The Court held that the cash distribution scheme violated equal protection because Alaska had "shown no valid state interests which are rationally served" by the scheme's creation of numerous, permanent classes of residents. *Zobel*, 457 U.S. at 65. The Court never suggested that the Alaska payment scheme imposed a penalty on interstate travel[6] and did not hold that the scheme was subject to heightened scrutiny.

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), involved a New Mexico statute that provided a partial property tax exemption to Vietnam War veterans, but limited the exemption to veterans who were New Mexico residents prior to 1976. Relying on its opinion in *Zobel*, the Court held that the different treatment afforded New Mexico war veterans based on the date they first became New Mexico residents violated equal protection

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[6] Indeed, such a finding would have been untenable, since the Alaska payment scheme could only serve to encourage migration from other states, which lacked similar payment schemes.

because it did not "rationally further[]" any "legitimate state purpose." *Hooper*, 472 U.S. at 618-623. Because the Court found that the statute did not pass "even the minimum rationality test," the Court had no occasion to consider whether the statute penalized interstate travel or should be subjected to heightened scrutiny. *Id.* at 618.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), involved a New York law that provided a civil service preference to New York veterans, but only if they were New York residents at the time they first entered military service. A splintered Court struck down the law on equal protection grounds, but no opinion commanded a majority. Nor could the Court agree regarding whether heightened equal protection review was appropriate. Four justices (the three dissenters plus Justice White) said that rational basis review should apply because the law did not implicate the right to travel. *Soto-Lopez*, 476 U.S. at 916 (White, J., concurring in the judgment); *id.* at 922 (O'Connor, J., dissenting). Four justices said that heightened equal protection review was required because the statute "operates to penalize appellees for exercising their rights to migrate." *Id.* at 909 (plurality opinion). The ninth justice, Chief Justice Burger, said that the statute flunked the rational basis test and thus there was no reason to decide whether heightened scrutiny applied. *Id.* at 912-16 (Burger, C.J., concurring in the judgment).

Accordingly, nothing in *Zobel*, *Hooper*, or *Soto-Lopez* supports the lower courts' holding that § 11450.03, by differentiating among residents based on length of residency, implicates the right to interstate travel and thus is appropriately subject to heightened equal protection scrutiny.

Indeed, even the *Soto-Lopez* plurality -- in finding that a law differentiating among residents based on length of residency imposes a penalty on interstate travel -- relied principally on a factor not present in the instant case: the New York statute effected a "*permanent* deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time." *Soto-Lopez*, 476 U.S. at 909 (plurality opinion) (emphasis added). There is no such permanent deprivation in the instant case; § 11450.03 provides for full benefits for new arrivals after they have resided in California for 12 months. There is simply no case-law support for the district court's contention that a law that ensures that those who migrate to California will not suffer a decrease in welfare benefits nonetheless somehow penalizes interstate travel.

Moreover, the district court's own factual findings undercut its legal conclusion that § 11450.03 penalizes interstate travel. After reviewing evidence submitted by Respondents, the court concluded that California's higher-than-average AFDC benefits do *not* act as a "welfare magnet"; i.e., do not induce indigent Americans to move to California in search of higher benefits. If that factual finding is correct, then the converse must also be true: § 11450.03's cap on benefits to new arrivals would not discourage travel by indigents who seek to move to California.

C. California Has No Obligation To Subsidize Respondents' Exercise of Their Right to Travel

As noted above, *Memorial Hospital* makes clear that laws imposing minor burdens on interstate travel (e.g., interstate bridge tolls, taxes on interstate airplane tickets) do not constitute a "penalty" such that heightened equal

protection review is warranted. If minor burdens on interstate travel do not warrant heightened review, then surely a State's decision not to confer a benefit on migrants (such as a decision not to provide welfare benefits at a level higher than the migrants were eligible to receive in their former state) does not warrant heightened review.

The Court has repeatedly held that government has no obligation to subsidize the exercise of even fundamental rights. Thus, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a nonprofit organization's claims of free speech/equal protection rights to receive tax deductible contributions to support its lobbying activity. The Court explained that the "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Here, California has not "regulated" the right to travel, but has, at most, "simply chosen not to pay" the costs associated with its exercise. *Id.*

Like the classification in the Food Stamp Act upheld by the Court in *Lyng v. UAW*, 485 U.S. 360 (1988), which denied food stamps to households of striking workers, California's classification "does not 'order or prevent'" anyone from migrating to the state. *Id.* at 365 (citation omitted). The Court noted in *Lyng*, "Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368. *See also Harris v. McRae*, 448 U.S. 297, 321-26 (1980) (Medicaid funding need not be provided for women seeking medically necessary abortions).

In short, the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid

may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). California may not, of course, employ irrational classifications as the basis for withholding governmental aid; but surely a decision not to *increase* aid above what an indigent individual has previously received (thereby declining to subsidize the indigent's travel) does not provide justification for courts to employ heightened equal protection scrutiny.

D. The Relevant Comparison for Purposes of Determining Whether Respondents' Right to Travel Has Been Penalized Is Between Respondents and Comparably-Situated Welfare Recipients in the States from Which They Came

In support of its contention that § 11450.03 penalizes the right to interstate travel, the appeals court asserted that the relevant comparison for determining the existence of a penalty is between Respondents and comparably-situated welfare recipients among long-term California residents, not between Respondents and comparably-situated welfare recipients in the states from which they had come. Pet. App. 11. In making that assertion, the appeals court has misconstrued *Zobel, Hooper*, and *Soto-Lopez*.

The court of appeals erred in labeling those three cases as "right to travel" cases. As noted above, those three cases involved classifications of residents of a State based on duration of residency. In none of the cases did the Court apply a "right to travel" analysis or find that heightened scrutiny was warranted. Although the Court's equal protection analysis in those cases involved comparing newcomers to long-term residents of the same State, the

Court did so solely for the purpose of determining whether the State had a rational basis for treating those two groups differently. It never suggested that a comparison between those two groups was relevant to determining whether the schemes penalized interstate travel.

The two cases in which the Court has found that public assistance statutes penalized exercise of the right to travel -- *Shapiro* and *Memorial Hospital* -- involved plaintiffs who were demonstrably worse off after moving to new States. In both instances, plaintiffs were eligible for public assistance in their prior States but were barred from receiving assistance for 12 months in their new States. Thus, the Court apparently determined that strict equal protection scrutiny was appropriate in these two cases based on a comparison between the plaintiffs and similarly situated welfare recipients *in the States from which they had come;* only by making such a comparison could the Court determine that the challenged statutes deterred or penalized migration.

The Ninth Circuit employed a similar analysis in a case raising a right-to-travel claim. *Fisher v. Reiser*, 610 F.2d 629 (9th Cir. 1979), involved a Nevada statute that provided a cost-of-living increase to workers' compensation beneficiaries who had been injured at work in Nevada and still lived in the state, but denied a cost-of-living increase to similarly-situated beneficiaries who had moved out of Nevada. In determining whether the statute effected a burden on interstate travel, the court declined to focus on a comparison between beneficiaries who had remained in Nevada and those (such as the plaintiff) who had exercised

their right to leave the state.[7] Rather, the court focused on a comparison between the plaintiff and others similarly situated to the plaintiff (i.e., other beneficiaries who were no longer residents of Nevada). *Fisher*, 610 F.2d at 633-35 (Kennedy, J.). Since Nevada did not provide cost-of-living increases to other non-resident beneficiaries who had not exercised the same interstate travel rights as had the plaintiff, the Court held that Nevada had not penalized the plaintiff based on her interstate travel when it denied her a cost-of-living increase, and thus declined to apply heightened equal protection scrutiny. *Id.*

In sum, the courts below erred in applying heightened equal protection scrutiny to § 11450.03. The courts should have confined themselves to a determination of whether the California law rationally serves a legitimate state interest.

II. § 11450.03 IS JUSTIFIED BY THE DIFFERING RELIANCE INTERESTS OF LONGTIME RESIDENTS AND NEWCOMERS

The residency-based benefit levels adopted by California easily pass rational basis review. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the

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[7] Of course, had the court made such a comparison, it would have been forced to conclude that the Nevada statute severely disadvantaged those beneficiaries opting to leave the state and thus that the statute should be subject to heightened equal protection scrutiny.

classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Residency-based cuts in welfare have such a basis: they allocate cuts in benefits so that the cuts fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles. Petitioners never had the opportunity to make such a showing, however, because the lower courts erroneously applied strict scrutiny.

California has been suffering under a long-standing budgetary crisis. In 1992, the year that § 11450.03 was enacted, the state was in such straights that it was forced to pay its employees with I.O.U.'s known as "registered warrants," which some banks refused to accept. *See* Michael Meyer, "California Broke, But Who Will Fix It?," Newsweek, Aug. 17, 1992, at 37.

The residency-based welfare benefit levels were expected to make a modest, but useful, contribution to the state's budgetary outlook. The record indicates that the district court's suspension of the implementation of § 11450.03 was expected to result in $10.9 million in additional state expenditures in Fiscal Year 1997-98 alone.

When the case was initially before the district court in 1993, the court found, without analysis, that new residents are "no better able to bear the loss of benefits than a group randomly drawn." *Green v. Anderson*, 811 F. Supp. at 523. This conclusion has no apparent basis in the record (either in 1993 or in 1997) and was not repeated in connec-

tion with the court's latest injunctive order. To the extent that the record is deficient in this regard, the fault lies with Respondents, because "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" *Beach Communications*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).[8]

The district court suggested that California could effect its desired savings by reducing AFDC benefits to a slight degree across the board. Pet. App. 31. While California could have proceeded in that fashion, it chose instead to allocate its cost savings in a different manner -- such that a group that had come to expect benefits at a particular level would not be disappointed. As the Supreme Court has warned, "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect expectation and reliance interests has been recognized by the Court as a legitimate objective, although it necessarily

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[8] If *amici* are correct that new residents are better able to bear the loss of welfare benefits than are long-term residents, then it does not matter whether California has pressed that rationale in support of § 11450.03. "The Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

discriminates against the interests of newcomers. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

In *Nordlinger*, the Court considered an equal protection challenge to a California provision that restricted increases in the assessed valuation of real property to 2% each year. *Nordlinger*, 505 U.S. at 5. Property sales triggered new assessments at market value. *Id.* Because real estate prices were escalating, the scheme forced newcomers to pay considerably higher real estate taxes than longtime owners. *Id.*

The Court, applying the rational basis standard of review, cited two grounds sufficient to uphold the classification: (1) an interest "in local neighborhood preservation, continuity, and stability"; and (2) the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12. Here, as in *Nordlinger*, the State may have thought established residents hold greater "vested expectations" in their level of benefits and in the lifestyle, however modest, they have been able to finance with those benefits for their children. Also, a prospective new resident "has full information" about the reduced benefits when he moves into the state, and can consider them in deciding where to move. *Id.* These legitimate, non-invidious reasons for the distinction

are sufficient to justify it under a rational basis standard.[9]

It is true that the Court struck down durational residency requirements on equal protection grounds in *Zobel, Hooper,* and *Soto-Lopez*. However, the Court did so not out of any distaste for durational residency requirements, but rather because the defendants in those cases failed to articulate any legitimate, rational basis for the distinctions they drew between old and new residents. The Court made particularly clear in *Hooper* that it will not accept as a rational basis for such distinctions a State's desire to preserve its resources for "its own" residents -- since new residents are just as much a part of the State's "own" residents as are long-term residents. *Hooper*, 472 U.S. at 623. But nothing in *Zobel, Hooper*, or *Soto-Lopez* indicates that the Court would have been unwilling to uphold the disputed durational residency requirements if the States had articulated rational bases for them. Since a rational basis exists for § 11450.03, it should be upheld.

III. THE VALIDITY OF CALIFORNIA'S PROGRAM IS FURTHER SUPPORTED BY CONGRESSIONAL AUTHORIZATION

The courts below overturned not only the judgment of the California legislature but also that of Congress, which expressly authorized such programs when it adopted 42 U.S.C. § 604(c) as part of PRWORA; and that of HHS, which certified the California TANF plan that included the provisions for reduced benefits for newcomers.

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[9] *See also Shapiro,* 394 U.S. at 672-74 (Harlan, J., dissenting) (outlining four legitimate purposes served by State welfare residency requirements).

Hence, even if California's plan is held to be a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a State establishes such a program on its own, but the standard of review to be applied when a State establishes such a program with congressional authorization. The existence of congressional approval provides an independent reason for employing a deferential "rational basis" review.

In *Shapiro*, the Court found that the Social Security Act contained no congressional approval for durational residency requirements that banned all welfare benefits during the first year of residency. *Shapiro*, 394 U.S. at 639-40. The Court further indicated in *dictum* that, in any event, a State law that violated the Equal Protection Clause would not escape judicial review by virtue of congressional endorsement: "Congress may not authorize States to violate the Equal Protection Clause. . . . Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Id.* at 641.

But that *dictum* is based on the assumption that the State program in question has already been determined to violate the Equal Protection Clause. It does not speak to the issue presented here: what effect does congressional approval have, if any, on the standard of review to be applied in determining whether § 11450.03 does, in fact, violate the Equal Protection Clause? Given the substantial deference owed by the courts to Congress when the latter is exercising its delegated powers, Congress's approval of § 14450.03 should weigh heavily in determining the proper standard of review. As the Court stated in *Lyng*, "[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be

deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the Courts." *Lyng*, 485 U.S. at 373.

Moreover, while Congress is clearly subject to equal protection restraints, it is less clearly bound by the restraints imposed by virtue of the constitutional right to travel (the asserted basis for the lower courts' resort to heightened equal protection scrutiny of § 11450.03). The Court has never identified a precise textual source for the right to travel; and at least three of the constitutional provisions suggested as bases for that right -- the Privileges and Immunities Clauses of Art. IV, § 2 and of the Fourteenth Amendment; and the Commerce Clause -- are inapplicable to Congress and can be overridden by Congress in their application to the States.

Amici respectfully submit that at least where, as here, the contested provision of State law places only a burden upon interstate travel -- if it does that much -- and does not regulate anyone's travel into the state, the appropriate analytical framework is that developed by the Supreme Court in deciding claims based on the "dormant" Commerce Clause. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System,* 472 U.S. 159, 174 (1985). Federal regulations adopted pursuant to congressional authority can also authorize state actions that would otherwise violate the Commerce Clause. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213-15 (1983). Congress adopted PRWORA pursuant to its Commerce Clause powers; *amici* submit that the Commerce Clause provides ample authority for Congress to authorize

the durational residency requirements so clearly authorized by 42 U.S.C. § 604(c).

The Court has repeatedly recognized the appropriateness of judicial deference to congressional authority even when core constitutional rights are at stake. For example, in *Plyler v. Doe,* 457 U.S. 202 (1982), even while asserting the equal protection rights of undocumented aliens children to attend local public schools, the Court recognized that Congress -- in the exercise of its constitutional authority over immigration matters -- could establish a national policy barring undocumented aliens from the schools. *Plyler,* 457 U.S. at 224, 226. Similarly, in *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997), while asserting ultimate judicial authority to determine the meaning of the Fourteenth Amendment, the Court acknowledged that "Congress must have wide latitude" in carrying out measures that Congress believes are necessary for enforcing the Fourteenth Amendment. *City of Boerne,* 117 S. Ct. at 2164.

Welfare residency requirements were enforced by 46 States before being prohibited in 1970 by *Shapiro. See Shapiro,* 394 U.S. at 676 n.36 (Harlan, J., dissenting). State-funded welfare benefits have been falling ever since. When considered in 1993 dollars, the average monthly State AFDC benefit "rose steadily from $344 in 1940 to $676 in 1970, only to start a rapid and continuing decline to $373 in 1993." T. Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike,* 31 VAL. L. REV. 893, 926 (1997). Congress may well have determined that States' decreased generosity to the indigent was attributable, at least in part, to their reluctance to offer benefits that might attract indigents from other States. In adopting PRWORA, Congress could

rationally have decided to overcome that reluctance by permitting States offering generous benefits to take steps designed to ensure that they did not thereby become "welfare magnets." *See id.* at 933-938.

The Court should be reluctant to second-guess Congress's determination, made pursuant to its Commerce Clause powers, that the interests of the national economy would be best served by permitting States to adopt legislation of the type at issue here. In light of that determination, *amici* submit that the Court's review of § 14450.03 should be highly deferential.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court reverse the judgment of the court below.

Respectfully submitted,

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